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2 UNITED STATES DISTRICT COURT  
3 DISTRICT OF MASSACHUSETTS

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5 IN RE: NEW ENGLAND COMPOUNDING ) MDL NO. 13-02419-RWZ  
6 PHARMACY CASES LITIGATION )  
7 )  
8 )

9 BEFORE: THE HONORABLE RYA W. ZOBEL AND  
10 THE HONORABLE JENNIFER C. BOAL  
11

12 **STATUS CONFERENCE**  
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16 John Joseph Moakley United States Courthouse  
17 Courtroom No. 12  
18 One Courthouse Way  
Boston, MA 02210

19 April 14, 2016  
20 2:00 p.m.  
21

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## P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Rya W. Zobel, United States District Court Judge, and the Honorable Jennifer C. Boal, Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on April 14, 2016.)

JUDGE ZOBEL: Good afternoon. Please be seated.

COURTROOM DEPUTY CLERK URSO: This is In Re: New England Compounding. It's 2013-MD-2419.

JUDGE ZOBEL: Good afternoon, all. Thank you for your, as always, good agenda. And I guess the question I have is, do we need to hear argument on both of these motions?

MS. JOHNSON: The first motion, your Honor, plaintiff is represented by Ms. Patty Kasputy, who is on the telephone. She asked to appear by telephone. Ms. Kasputy may have an opinion.

JUDGE ZOBEL: Who is appearing for Box Hill?

MR. KIRBY: Your Honor, Greg Kirby on behalf of Box Hill Surgery Center and related entities, and I would defer to the Court --

JUDGE ZOBEL: Hold it one second. I need to...

(Pause.)

JUDGE ZOBEL: Here it is. You're Mr. Kirby?

MR. KIRBY: I am, yes, still.

1 JUDGE ZOBEL: Who else needs to be heard on this?

2 MS. JOHNSON: Ms. Kasputy, who is on the telephone.

3 MS. KASPUTY: Good afternoon, your Honor. This is  
4 Patty Kasputy. I'm willing to submit on the briefs if the  
5 defendants' counsel is also willing to do so.

6 JUDGE ZOBEL: You have a chance to be gentle with me.

7 MR. KIRBY: I'm sure you've read everything and  
8 you're up to speed and you probably know everything there is  
9 to know about the law in that aspect. So, if that's what you  
10 would like --

11 JUDGE ZOBEL: If that's the basis for your not  
12 arguing...

13 (Laughter.)

14 JUDGE ZOBEL: So, are you prepared to waive argument  
15 as well? I mean, your briefs are very good, both of you.

16 MR. KIRBY: Thank you. I'm prepared to waive if  
17 that's what the Court would prefer.

18 JUDGE ZOBEL: Ms. Kasputy, do you as well?

19 MS. KASPUTY: I am. And thank you, your Honor.

20 JUDGE ZOBEL: Thank you both, and I will take the  
21 matter under advisement.

22 Now, we come to the next one, which is the  
23 plaintiffs' motion for reconsideration of the order. Mr.  
24 Stranch, are you going to argue?

25 MR. STRANCH: Mr. Chalos will be arguing this one,

1 your Honor.

2 JUDGE ZOBEL: And you want to argue?

3 MR. CHALOS: Your Honor, we would like to be heard  
4 briefly on this.

5 JUDGE ZOBEL: Who will argue on behalf of the  
6 defendant?

7 MR. GIDEON: C.J. Gideon on behalf of the Tennessee  
8 Clinic Defendants, your Honor.

9 JUDGE ZOBEL: Okay. I'll hear you, briefly.

10 MR. CHALOS: Okay. Your Honor, we're in the  
11 unenviable and always uncomfortable position of asking your  
12 Honor to reconsider a ruling that you've already made, and I  
13 don't intend to belabor the underlying issues about why we  
14 think that --

15 JUDGE ZOBEL: We're very hardened to criticism.

16 MR. CHALOS: Right. Well, we don't intend to belabor  
17 the issue of why we think this order should be reconsidered  
18 and why we think the results should be different, but we do.

19 The thrust of our argument is that we believe these  
20 statutes can be read in harmony. We believe they should be  
21 read in harmony, and in the absence of definitive appellate  
22 guidance, which I think is where we find ourselves on this  
23 after hearing what everybody said about it, your Honor  
24 initially was inclined to go our way and your Honor's order  
25 from 2014, your Honor --

1 JUDGE ZOBEL: I've learned something since then.

2 MR. CHALOS: I'm sorry?

3 JUDGE ZOBEL: I've learned something since then.

4 MR. CHALOS: Fair enough.

5 JUDGE ZOBEL: I will learn something today, too.

6 MR. CHALOS: I hope so in this regard, but we do have  
7 an absence of definitive appellate guidance, I think, on this  
8 issue. The defendants have said here that it's clear under  
9 Tennessee law which way it should come out. They told the  
10 District Court in Nashville that it's not so clear and that  
11 the Tennessee Supreme Court should decide this certified  
12 question, and it is a complicated question. There are a  
13 number of different principles at work here. We have two  
14 statutes that have been amended recently, relatively speaking.

15 JUDGE ZOBEL: If we do this, we have no trials coming  
16 up, right?

17 MR. CHALOS: I'm sorry?

18 JUDGE ZOBEL: There will be no trials because it will  
19 totally upset the trial schedule.

20 MR. CHALOS: If we do what?

21 JUDGE ZOBEL: If you win on the reconsideration.

22 MR. CHALOS: I don't think so. And here's my  
23 suggestion, your Honor:

24 I think there is a way forward that everyone -- you  
25 know, both we and the defendants can believe they're correct

1 and your Honor need not make a decision at this point that is  
2 irreparable, and our solution -- proposed solution is what we  
3 put forth in our papers, which is your Honor can send both  
4 claims to the jury. It would be the addition of one or two  
5 questions to the jury Verdict Form. The proof would be  
6 virtually identical. We went -- we've lined out our proof as  
7 we're preparing for trial and I think we would possibly add  
8 one witness to address some of the unique issues under the --  
9 whether the product was sold under the Medicare guidelines and  
10 the paying -- the provisions that govern the paying for  
11 Medicare and the insurance companies to the healthcare  
12 provider, but, otherwise, it's basically exactly the same  
13 proof, and if we're correct and the jury finds that there is a  
14 sale of a product here and that the product was defective or  
15 reasonably -- unreasonably dangerous, then we've got a jury  
16 finding on it.

17           Conversely, if we don't send that claim to the jury  
18 and the First Circuit or the Tennessee Supreme Court later  
19 determines that -- that that is a viable claim, as we think it  
20 is, we'd have to redo all the trials. We'd have to redo  
21 the --

22           JUDGE ZOBEL: Why?

23           MR. CHALOS: -- Bellwethers.

24           JUDGE ZOBEL: If you win on one piece of it, you're  
25 not going to redo it to win on the other piece, too, are you?



1 I mean, the damages would be the same regardless.

2 MR. CHALOS: The damages would be the same, but  
3 here's the scenario we want to avoid:

4 If we go to trial and we do not have both claims  
5 submitted to the jury, there's no product claim, and it turns  
6 out these statutes can be read in harmony, and that's what  
7 either the First Circuit or the Tennessee Supreme Court  
8 decides, and the damages would be calculated differently under  
9 the Product Liability Act --

10 JUDGE ZOBEL: Because it's a comparative negligence  
11 issue.

12 MR. CHALOS: It's a comparative negligence issue and  
13 under the Product Liability Act, the -- there's strict  
14 liability. So, joint and several on the seller because  
15 there's a bankruptcy. The manufacturer is in bankruptcy under  
16 that -- under that act.

17 JUDGE ZOBEL: Okay.

18 MR. CHALOS: So, you know, conversely, if we submit  
19 it to the jury, the jury may find there is no product sale  
20 here and we lose, and that's it. It's a non-event. The jury  
21 might find that there is a sale product, in which case we  
22 would have to elect our remedies, but either way, I assume,  
23 however these trials come out, one side or the other will  
24 appeal.

25 So, there will be an appellate court, either the

1 First Circuit or the Tennessee Supreme Court, through a  
2 certified question, which is in the works in the District  
3 Court in Tennessee. One way or another, we are going to get  
4 an appellate decision at some point, presumably, and the safer  
5 course here, we suggest, is the no-harm course of submitting  
6 it to the jury. The jury may straighten it all out and may  
7 never be an issue, but we want to give them the opportunity to  
8 consider that claim, and that's the most prudent course and  
9 that's the course we think that will conserve the resources of  
10 the Court and the parties rather than put us in a position  
11 where we may have to review all the Bellwethers to find out  
12 whether the jury would find there's a product liability claim  
13 here, assuming the appellate courts agree with us.

14 So, we would propose that your Honor need not decide  
15 the substantive issue at this point and, rather, just add a  
16 question or two on the jury Verdict Form.

17 JUDGE ZOBEL: I should pretend --

18 MR. CHALOS: I'm sorry?

19 JUDGE ZOBEL: I should just pretend that it's there.

20 MR. CHALOS: Well, not pretend. Allow us to go to  
21 the jury on competing theories of liability, which we've given  
22 your Honor in our reply, you know, half a dozen or more cases  
23 where there's a product liability claim and there are other  
24 claims as well.

25 In fact, in your Honor's order, you cited the *Greene*

1     *vs. Brown & Williamson* case out the Western District of  
2     Tennessee and that's exactly what happened. There's a product  
3     liability claim there and there's also a civil conspiracy and  
4     a fraud claim that also was viable.

5             So, the fact that you have a product liability claim  
6     and a negligence claim under a different theory go to the jury  
7     is not -- doesn't require any pretending. It's just under  
8     Tennessee law it's permissible. So, we think that's the more  
9     prudent course here.

10            JUDGE ZOBEL: Okay. Mr. Gideon.

11            MR. GIDEON: Yes, your Honor.

12            We characterize what Mr. Chalos asked you to do  
13     differently. We think he's asking you to take an uncharted  
14     course. I respectfully submit that he is incorrect in  
15     suggesting that the provisions in the Tennessee Products  
16     Liability Act can be reconciled with those in the Tennessee  
17     Healthcare Liability Act. If you will look at Pages 5 and 6  
18     of our brief, you can see how they are completely  
19     irreconcilable, as you held in your opinion.

20            In addition, the issue is not untouched by the  
21     appellate courts in Tennessee. Although they did not address  
22     *Ellithorpe vs. Weismark*, in effect, they're asking you to  
23     ignore it and act as if it hadn't been decided. In October of  
24     2015, our Supreme Court provided the guidance that said that  
25     the Tennessee Healthcare Liability Act governs all claims

1 against a licensed healthcare provider related to the delivery  
2 of healthcare services.

3 If there was any question about that following the  
4 *Ellithorpe* decision, there's been another decision, February  
5 10, 2016, which is entitled *Osunde vs. Delta Area Medical*  
6 *Center*, 2016 WestLaw 537075. In that case, just like Mr.  
7 Chalos, the plaintiff's lawyer said the only injury in this  
8 case comes from a radiology tech using a defective stool. It  
9 didn't have safety grids on it and wasn't even. So, it  
10 involved a product which ostensibly was sold to the plaintiff  
11 by virtue of the aggregate charge.

12 The plaintiff's lawyer said I'm not making any  
13 malpractice claims, any professional liability claims. The  
14 Court of Appeals in opinion February 10th, 2016, held it falls  
15 within the scope of the Tennessee Healthcare Liability Act and  
16 it provides the entire set of rules governing the claim.

17 So, we respectfully submit that you were right the  
18 first time. The *Osunde* case establishes that you are right  
19 again today, and no matter what your skill is on the bench,  
20 you could not adequately or accurately instruct a jury in a  
21 case like this if you permitted them to proceed on the  
22 products liability claims at the same time as the professional  
23 liability claims. They are absolutely inextricably and  
24 totally at odds with each other, and that's what you held  
25 originally. That's what you should stand by.

1 JUDGE ZOBEL: Okay. I was just wondering about  
2 instructing the jury. The U.S. Attorney in this district  
3 tends to bring lengthy indictments with many, many RICO  
4 counts, conspiracy, substantive, relying on predicate offenses  
5 that are state law offenses. I don't know how many different  
6 offenses I've charged in one case, but it's not impossible.  
7 One can do it. I think the more difficult part is really how  
8 you present the evidence when you have to.

9 MR. GIDEON: But if -- for example, expert testimony  
10 is not required in a products liability case. Expert  
11 testimony is, by law, required in a healthcare liability case  
12 that deals with application on the standard of care.

13 If you gave a stripped-down instruction to the jury  
14 to ask them to determine were the defendants at fault, like  
15 they do in Kentucky, but charge them on products liability,  
16 charge them on professional liability, we wouldn't know the  
17 basis for the decision. They would have to be instructed --

18 JUDGE ZOBEL: No. You would because they would have  
19 to answer questions.

20 MR. GIDEON: Oh, yes, but --

21 JUDGE ZOBEL: And the questions would be parsed to  
22 the different claims and defenses.

23 MR. GIDEON: But, as you have previously held, the  
24 substantive law of Tennessee governs this case.

25 JUDGE ZOBEL: No, I'm not fighting with you about

1 that. I was just trying to figure out whether, indeed, as a  
2 practical matter, one can follow the plaintiffs' suggestion.

3 MR. GIDEON: I think it would be impossible. If you  
4 look at Pages 5 and 6 of our brief of the differences between  
5 the substantive law and giving your Honor credit for a number  
6 of years on the bench, I don't think a jury could be  
7 adequately instructed, given the huge differences in  
8 substantive law between the two, the Products Liability Act  
9 and the Healthcare Liability Act. I don't think it could be  
10 done without leaving a jury confused and in truly uncharted  
11 territory.

12 JUDGE ZOBEL: Okay. Thank you.

13 MR. CHALOS: And, your Honor, if I just may say one  
14 other thing.

15 We submitted a proposed jury Verdict Form with our  
16 reply brief to demonstrate how this can be parsed through with  
17 the jury, and if your Honor would like, we're certainly happy  
18 to take a first cut at some jury instructions, but we think --  
19 we submitted to your Honor half dozen or more cases where  
20 juries are instructed on negligence, which is what he's  
21 talking about under the Healthcare Liability Act, and strict  
22 liability. It happens all the time and jurors tend to get it  
23 right.

24 JUDGE ZOBEL: Okay. I will take the papers.

25 MR. GIDEON: May I --

1 JUDGE ZOBEL: Another chance?

2 MR. GIDEON: May I have 30 seconds, please?

3 JUDGE ZOBEL: Ten.

4 MR. GIDEON: Thank you. 15?

5 All of the cases that were submitted to you, not one  
6 of them dealt with the circumstances here of a claim against a  
7 healthcare provider. They rely on a whole series of cases  
8 against auto manufacturers where the Tennessee Products  
9 Liability Act contemplates strict liability and negligence and  
10 warranty claims be tried together. Not one of those deals  
11 with the circumstances here where the Tennessee Healthcare  
12 Liability Act of 2012 clearly applies.

13 JUDGE ZOBEL: Okay.

14 MR. GIDEON: Thank you.

15 JUDGE ZOBEL: I will take the papers.

16 Now, we have another one, which is not part of this  
17 paragraph, Tennessee Clinic Defendant's motion to dismiss  
18 pursuant to Rule 37 and 12(b)(6). Do I need to hear argument  
19 on that? It shows up, Ms. Johnson, I think on the last page  
20 of the --

21 MR. GIDEON: Are these case specific to the Tyree  
22 case, your Honor?

23 JUDGE ZOBEL: I think so. It's No. 2798 on the  
24 docket. Yes, Tyree.

25 MR. GIDEON: Yes. I am perfectly comfortable with

1 the Court deciding that on the papers that have been  
2 submitted. We filed those into this. They've been pending  
3 for some time. If you wish to hear argument on anything, I  
4 will.

5 JUDGE ZOBEL: I do not. The only question for me is  
6 whether Judge Boal or I will decide it.

7 MR. GIDEON: But it is entirely ripe for the  
8 collective Courts' decision.

9 JUDGE ZOBEL: Okay. Thank you.

10 Now, those are the only motions that I know about as  
11 to which we were to hear or not hear argument today, correct?

12 MS. JOHNSON: Yes, your Honor.

13 JUDGE ZOBEL: So, now we go to the next part of your  
14 agenda, which is (B), the report to the Court.

15 MS. JOHNSON: Thank you, your Honor.

16 On Item No. 1, Mr. Gottfried will give us an update  
17 on the status of the bankruptcy.

18 MR. GOTTFRIED: Good afternoon, your Honors.

19 JUDGE ZOBEL: Good afternoon.

20 MR. GOTTFRIED: Two matters to report on:

21 The first one is with respect to the progress on  
22 completing the various tasks under the settlement. The post  
23 confirmation officer has been working diligently with the  
24 relevant parties to get the tax returns filed, which are the  
25 condition precedent to obtaining refunds, which will



1 ultimately benefit the estate. So, that work is ongoing.

2 JUDGE ZOBEL: Tax returns for the defendants?

3 MR. GOTTFRIED: Yes. So, that's taking up a good  
4 deal of --

5 (Noise coming from telephone speaker.)

6 JUDGE ZOBEL: Anybody commenting or sneezing?

7 (No response.)

8 MR. GOTTFRIED: The second thing I just wanted to  
9 make the Court aware of is that I think we're getting to the  
10 end of the late-filed proof -- proofs of claim. Judge Boroff  
11 allowed five today. The post confirmation officer, again, has  
12 been diligently working with the parties to get that process  
13 completed. Three parties were granted extensions by Judge  
14 Boroff, and I think we're getting to the end of that process  
15 as well. Thank you.

16 JUDGE ZOBEL: So, is there some sense now as to when  
17 there might be distributions, at least initial distributions  
18 from the trust fund?

19 MR. GOTTFRIED: I would defer that question to the  
20 PSC.

21 MR. ELLIS: Your Honor, this is dependent on clearing  
22 the liens and Medicare. So, if we're able to reach a solution  
23 -- and we have made significant progress with Medicare. If we  
24 are able to reach a solution in the next, say, two, three,  
25 four weeks --

1 JUDGE ZOBEL: Is Medicare making claims against the  
2 trust fund?

3 MR. ELLIS: Yes, they have Medicare secondary payor  
4 statute claims.

5 JUDGE ZOBEL: So, they, too, have to do it claimant  
6 by claimant?

7 MR. ELLIS: Well, we have to determine -- they have  
8 to determine at least Medicare eligibility for each of the  
9 claims before payments can be made. That is actually in  
10 process for the first 1200 claims.

11 JUDGE ZOBEL: Well, did Medicare, in fact, pay for  
12 some of the healthcare that the plaintiffs got?

13 MR. ELLIS: Yes. The average -- the median age of  
14 the victims at the time of the outbreak was 64 years old. So,  
15 we have -- and a lot of the victims were on Social Security  
16 Disability income. So, Medicare did -- the rates are pretty  
17 high and, yes, they covered a lot of medical costs.

18 So, if that can get resolved -- we've been talking to  
19 them. We've been talking to two law firms that represent  
20 about 75 to 80 percent the private insurance companies. If we  
21 can get this resolved in the next two to three weeks, it is  
22 conceivable that payments could possibly go out maybe the end  
23 of June, early July. If these negotiations fail, then each  
24 lien, each Medicare claim is going to have to be resolved  
25 individually and that will delay things. So, that's where we

1 are right now.

2 MS. JOHNSON: I should caveat for all the plaintiffs'  
3 attorneys on the phone that that would be the first wave of  
4 payments. It would not be an entire payment and it would only  
5 be payments for those whose claims have been fully approved as  
6 of now. So, it will be a staggered process over time with  
7 multiple payments issued, particularly, as Mr. Gottfried  
8 referred to, if and when there are tax refunds received, those  
9 go into the pot. That is potentially another payment down the  
10 road.

11 JUDGE ZOBEL: Thank you.

12 MR. GOTTFRIED: Thank you, your Honor.

13 MS. JOHNSON: That brings us to agenda Item No. 2,  
14 status of the insurance declaratory judgment actions, which  
15 Mr. Stranch will address.

16 MR. STRANCH: Your Honor, there's been no change  
17 since last time. The question of what to certify to the  
18 Tennessee Supreme Court is fully briefed and we're just  
19 waiting the District Court's order.

20 MS. JOHNSON: No. 3, status of discovery. 3(a) the  
21 Premier defendants and the Box Hill defendants and the  
22 plaintiffs -- the attorneys who represent plaintiffs in those  
23 cases have submitted a proposed schedule. It is one set of  
24 deadlines that would apply to both Box Hill and Premier. It  
25 reflects the efforts of all of those various groups to come up

1 with something that they think is workable.

2 I did want to flag one -- it's not even a concern,  
3 but just really something for the Court's consideration, which  
4 is this:

5 Discovery in the Premier cases has been ongoing and  
6 in Box Hill. In the Premier cases, in particular, my firm  
7 filed a stipulation of dismissal of one Premier case this  
8 morning. We did that with Mr. Kirby's assent and Mr. Wolk's  
9 assent. There may or may not be -- I don't know -- additional  
10 dismissals in the Premier cases. What I do know is that I  
11 expect that we'll have a much better sense of what the  
12 universe of Premier cases that would be proceeding to a trial  
13 or pretrial deadline. I think we'll know that much better  
14 next month.

15 JUDGE ZOBEL: What does it depend on?

16 MS. JOHNSON: I think it depends on many of the  
17 factors that educate our choice whether to proceed. In part,  
18 it depends on depositions that are upcoming, what happens  
19 there, depends on experts and opinions, all the usual things,  
20 your Honor. There's no one issue here. And, again, every  
21 counsel always makes their own individual choice about whether  
22 to proceed with particular cases, and in circumstances where  
23 there has been partial settlements, some counsel want to  
24 proceed and some clients, frankly, are happy with what they're  
25 getting. So, I think all of those factors weigh in to

1 counsel's decision whether to move forward.

2 And I don't mean to be sounding an alarm about it  
3 either. As I was filing my dismissal this morning, I thought  
4 I would mention to the Court things may look different next  
5 month and that may require revisiting the schedule.

6 JUDGE ZOBEL: Why would we be alarmed about cases going  
7 away?

8 MS. JOHNSON: Well, I would hope that you wouldn't.

9 JUDGE BOAL: How many Premier plaintiffs are there?

10 MS. JOHNSON: The last time we looked at a census, I  
11 think there were about 38 cases in the MDL, and I dismissed  
12 one. I believe there are at least a few others coming, but...

13 JUDGE BOAL: So, I have the proposed schedule and I'm  
14 thinking about it.

15 MS. JOHNSON: Okay. Thank you, your Honor.

16 JUDGE ZOBEL: That takes care of both of (b), right?

17 MS. JOHNSON: Yes, (b) has already been addressed.

18 That brings us to -- well, I should note, your Honor,  
19 (b)i, which was Summit Surgery Center's motion to quash, has  
20 been mooted by the subpoena, as some are being withdrawn.

21 (b)ii is just a note that Emory and Vanderbilt have both moved  
22 to quash as well, and the defendants' opposition to that is  
23 not yet due. So, I don't think that's ripe for decision yet.

24 JUDGE BOAL: So, I'm going to schedule those two for  
25 oral argument on May 19th.

1 MS. JOHNSON: Thank you, your Honor.

2 JUDGE ZOBEL: Which two?

3 (Discussion off the record at the Bench.)

4 MS. JOHNSON: On Item C, Box Hill defendants' notices  
5 of deposition by written question. I don't know if Mr. Kirby  
6 would like to address...

7 MR. KIRBY: Frankly, I have no idea what that is. I  
8 don't think we have any issues that we've dealt with at this  
9 point. We didn't have any clinics who filed motions to quash.  
10 So, we're good.

11 MS. JOHNSON: And then that brings us to the Court  
12 rulings update. I think the only thing to note here is that  
13 the deadline for common discovery as to Premier and Box Hill  
14 has been extended to June. The proposed schedule actually  
15 suggests pushing that back into August, and that's something  
16 that Judge Boal will consider, obviously.

17 The other issue is the deposition of David Kessler  
18 will be -- we've resolved that?

19 (Discussion off the record.)

20 MS. JOHNSON: The outstanding issue is to Kessler,  
21 which I think we'll get to when we come to common expert  
22 discovery.

23 JUDGE BOAL: So, I think I had issued an order asking  
24 whether or not you wanted oral argument and whether it could  
25 wait until the May hearing.

1 MR. CHALOS: Your Honor, that's not our motion.  
2 We're opposing that motion. We haven't yet filed our  
3 opposition.

4 JUDGE BOAL: Okay.

5 MR. GIDEON: Yes, it can wait until May. We are  
6 willing to submit the matter to you on the papers with the  
7 request being made under MDL Order 11, Subsection B, that we  
8 have the right to submit a reply once the PSC does its  
9 response to our motion. If that were to be granted, we would  
10 be perfectly happy with you deciding that on the papers.

11 JUDGE BOAL: I don't think you need it to be granted,  
12 right? Under the MDL order, you can file a reply.

13 MR. GIDEON: I don't think so, your Honor. If you  
14 look at MDL Order 11, since this is a non-dispositive  
15 motion --

16 JUDGE BOAL: Yes.

17 MR. GIDEON: -- I think I either have to get their  
18 permission or it has to be --

19 JUDGE BOAL: So, it's granted.

20 MR. GIDEON: Okay. Thank you.

21 MS. JOHNSON: Regrettably, your Honors, we just file  
22 replies, even though we're not entitled to do that, and we've  
23 done that too often, frankly, in this case.

24 MR. GIDEON: And that was going to be one of the  
25 points earlier about the motion to alter or amend that was

1 argued a few moments ago. The PSC filed a reply without  
2 complying with the order, but we'll let that pass. I just  
3 appreciate this one -- this opportunity. Thank you.

4 MS. JOHNSON: I think that brings us to No. 4, the  
5 status of the litigation track. The competing Bellwether  
6 proposals were addressed last time. I think that's just a  
7 holdover from the last agenda, unfortunately, but --

8 JUDGE ZOBEL: We had not actually set specific dates.  
9 We set one trial in June, one July, one August, one September.  
10 Should we set specific dates now?

11 MR. STRANCH: Yes, your Honor.

12 JUDGE ZOBEL: And you said, I think, that the trials  
13 would take a week to a little over a week, right?

14 MR. GIDEON: No. No, your Honor.

15 JUDGE ZOBEL: What did you say?

16 MR. GIDEON: I wasn't here when that was argued, but  
17 secondhand I was told that you were going to start the first  
18 Bellwether case in July.

19 JUDGE ZOBEL: Was it July?

20 MR. STRANCH: That's correct, it's July.

21 JUDGE ZOBEL: Okay. So, July, but the length of the  
22 trial would be about a week.

23 MR. CHALOS: We think, your Honor, it probably will  
24 take a little bit longer than that. I think we can do our  
25 case in probably, I'm guessing, three to four days, maybe



1 three days, but I don't know how long their case is going to  
2 be. I think we might need a little bit longer than a week.

3 JUDGE ZOBEL: Okay.

4 MR. GIDEON: Your Honor, will the trial schedule be  
5 from 9:00 a.m. until 1:00 p.m.?

6 JUDGE ZOBEL: Yes.

7 MR. GIDEON: Five days per week?

8 JUDGE ZOBEL: Yes.

9 MR. GIDEON: Okay. Well, with that in mind, I think  
10 we will, likewise, take the same or a little bit longer in  
11 terms of substantive time to present Tennessee Clinics' proof.  
12 Will we go Monday through Friday?

13 JUDGE ZOBEL: You know, my understanding from the  
14 court reporters over the years is that the amount of  
15 transcript we produce between 9:00 and 1:00 is more than the  
16 amount of transcript produced starting at 10:00, stopping at  
17 1:00, or whatever, and going until 4:00 after lunch, because  
18 we have no interruptions from 9:00 to 1:00 except one recess.

19 MR. GIDEON: Okay.

20 JUDGE ZOBEL: So, I think the amount of trial time is  
21 concentrated and, in fact, the trial doesn't take any longer  
22 than if we were to sit all day. That is, all day as we used  
23 to do, 10:00 to whatever and then 2:00 to 4:00.

24 MR. GIDEON: The reason I inquired about Monday  
25 through Friday, I don't know if you will be taking criminal

1 pleas --

2 JUDGE ZOBEL: No. I do whatever I have to do in the  
3 afternoon.

4 MR. GIDEON: Okay. So, we have the time from 9:00  
5 until 1:00 --

6 JUDGE ZOBEL: 9:00 to 1:00 is your time. The only  
7 problem we sometimes have is traffic jams hold up the jury in  
8 getting here on time. The jurors, however, are very good  
9 about starting on time, being here on time if counsel are here  
10 on time. It's really interesting how conscientious they are.

11 MR. GIDEON: Okay.

12 MS. GREER: Your Honor, Marcy Greer for the Saint  
13 Thomas Entities.

14 We have filed a motion relating to the trial setting  
15 asking for various relief based on the criminal trial setting,  
16 the amount of work to be done, the remand issue, et cetera.  
17 It has not been responded to yet because the time has not  
18 passed, but we would ask the Court to take that into  
19 consideration.

20 JUDGE ZOBEL: Of course we will. We take into  
21 consideration everything you ask us to do. We may say no, but  
22 we take it into account.

23 So, I guess my job is to set some specific dates.  
24 And would it be better if we do it at the beginning of July,  
25 beginning of August or the last two weeks of the month? Which

1 is preferable?

2 MR. CHALOS: I think, your Honor, we'd prefer  
3 probably the later part of the months.

4 JUDGE ZOBEL: So, somewhere around the 15th of  
5 whatever month?

6 MR. CHALOS: That would be fine with us.

7 JUDGE ZOBEL: So, we'll look at that, and we'll send  
8 you a list of dates.

9 MR. CHALOS: Okay.

10 JUDGE ZOBEL: Starting in July, not June.

11 MR. CHALOS: Okay. Thank you, your Honor.

12 MR. STRANCH: Thank you, your Honor.

13 MR. GIDEON: I ask the Court for one accommodation.  
14 I am taking a daughter to law school in mid August. So, I  
15 would like to just not start that weekend that I move her into  
16 law school.

17 JUDGE ZOBEL: When are you going to law school with  
18 your daughter?

19 MR. GIDEON: August 15th and 16th, right in that  
20 timeframe. If we could start the following Monday.

21 JUDGE ZOBEL: That takes us into Labor Day.

22 MR. GIDEON: Yes.

23 JUDGE ZOBEL: I think. So, we'll need to -- you  
24 know, we'll try to accommodate you.

25 MR. GIDEON: Or perhaps begin beforehand and knock

1 off one day so I can get her to law school.

2 JUDGE ZOBEL: How long -- I mean, what days will you  
3 be gone at law school?

4 MR. GIDEON: I will move her in and she'll probably  
5 say, "Thank you, Dad," and --

6 JUDGE ZOBEL: I'm sorry?

7 MR. GIDEON: I'll move her in and I suspect she'll  
8 say, "That's good enough. Thank you, Dad." So, it will  
9 probably just require a day.

10 JUDGE ZOBEL: August 15th is a Monday. I think we  
11 can probably do it because we have a full week of August 15th,  
12 August 22nd, and a half a week of August 29th before Labor  
13 Day.

14 MR. GIDEON: So, we could start on Tuesday, the 16th,  
15 something like that.

16 JUDGE ZOBEL: We can do something like that. The  
17 problem is that we only get jurors on Mondays, the first day  
18 of the week, and we all impanel whatever cases are going to go  
19 to trial that week on that day.

20 So, maybe it's possible, even if you can't be here  
21 that day, that someone can stand in for you for the  
22 impaneling, and we wouldn't then get going until the next day.

23 MR. GIDEON: Okay. If there is a conflict, I will  
24 let the Court know.

25 JUDGE ZOBEL: Okay.

1 MR. GIDEON: Thank you.

2 MS. GREER: Your Honor, Marcy Greer again.

3 One of the grounds in our motion is the idea that the  
4 cases may take longer than a month to try for each time and  
5 the numbers and the days that --

6 JUDGE ZOBEL: It won't.

7 MS. GREER: Well, the days that you were given don't  
8 include the Saint Thomas Entities' defense, which there're  
9 going to be some issues that are different. So, we need to  
10 add on a little bit more time for the Saint Thomas defense.

11 JUDGE ZOBEL: Okay. What else?

12 MS. JOHNSON: That brings us to 4(a) -- (b), 4(b),  
13 update on common expert discovery. The update, as I...

14 MR. STRANCH: Your Honor, for the Tennessee  
15 Bellwether cases, all of the common experts have been deposed.  
16 There is one matter that's still outstanding, which is the  
17 motion to compel Dr. Kessler to sit for a second deposition.  
18 Other than that, the common portion of the expert discovery is  
19 completed.

20 JUDGE ZOBEL: Thank you.

21 MS. JOHNSON: Item C, status of entry of final  
22 judgment as to settling parties.

23 JUDGE ZOBEL: Now, I know that there is this problem.  
24 And I think Ms. Gioia has talked with you about this?

25 MS. JOHNSON: Yes, your Honor.

1 JUDGE ZOBEL: So, you're working it out?

2 MS. JOHNSON: Yes.

3 JUDGE ZOBEL: For some reason, we have a very  
4 difficult system.

5 MS. JOHNSON: Yes. May I give just a brief report  
6 for the other parties on that?

7 JUDGE ZOBEL: Yes.

8 MS. JOHNSON: So, I did speak with Ms. Gioia earlier  
9 this week. She informed me that she had been trying to find a  
10 way to do this en mass or an efficient means rather than  
11 having to go into each individual docket and, regrettably, it  
12 appears that that is not possible. And so, it will require a  
13 tremendous amount of work on the Clerk's part to call up these  
14 dockets and click the appropriate boxes and that is  
15 unfortunate, but Ms. Gioia, as the Court knows, is aware of  
16 this and is beginning this process and will be doing it as  
17 time permits.

18 JUDGE ZOBEL: That is the gist of the problem. The  
19 Court can't automatically close 400 cases. We got to do it  
20 one at a time. Okay. So much for computers and making life  
21 easier.

22 MS. JOHNSON: That brings us to the defendants'  
23 notice of service of case-specific expert reports, and Mr.  
24 Stranch wanted to be heard on the case-specific issues.

25 JUDGE ZOBEL: I'm sorry. Which number is this -- oh,

1 I see (d).

2 MR. STRANCH: Your Honor, I wanted to let you know  
3 that the defendants did serve their case-specific expert  
4 reports. We have an issue that we wanted to flag for you.  
5 You may recall at the last conference, we discussed scheduling  
6 and depositions of those cases that were the four that were  
7 selected to go to trial, and then the three other Bellwethers  
8 that were not selected for trial yet, we've worked out an  
9 agreement on how we want to handle that partially. What we  
10 would like to do -- and you'll see a stipulation to this  
11 effect shortly -- is extend the case-specific discovery  
12 deadlines to the end of May. It's currently the beginning of  
13 May. Extend that to the end for the four cases that will be  
14 tried, and then for the three that are not currently set for  
15 trial, we would like to extend those deadlines to July, and  
16 then we're going to meet and confer and determine whether we  
17 need to extend those further or whether we want to go ahead  
18 and have those cases ready at this time, and we're working  
19 together on that now and we'll get you something -- a  
20 stipulation in writing on that shortly.

21 JUDGE BOAL: And does that type of extension -- will  
22 that require the moving of any other dates?

23 MR. STRANCH: No, your Honor. It will just be the  
24 ones that deal with those specific issues. It won't affect  
25 any other dates in the case.

1 MS. GREER: Well, actually, your Honor, it would move  
2 the *Daubert* deadline.

3 JUDGE BOAL: Which is now in May?

4 MS. GREER: May 27th.

5 MR. STRANCH: The common discovery *Daubert* deadline  
6 is May 27th. And so, that will remain the same, your Honor,  
7 because common expert discovery is completed other than the  
8 issue with Dr. Kessler. So, it would not affect case-specific  
9 issues related to that.

10 MR. GIDEON: Well, I want to make sure, Judge Boal,  
11 you understand that there's another matter that's not ripe yet  
12 where we have taken the position that one of these case-  
13 specific disclosures, a Matthew Lee --

14 JUDGE BOAL: Yes. I looked at the papers. I'm  
15 waiting for the other side's response, but I understand your  
16 argument to be that someone who is designated as case-  
17 specific is actually a common --

18 MR. GIDEON: Right.

19 JUDGE BOAL: -- and was disclosed late under that --

20 MR. GIDEON: Correct. And irrespective of how you  
21 decide that -- if you decide it in our favor, then that common  
22 expert's deposition has not been taken, but it will not need  
23 to be taken.

24 JUDGE BOAL: Got it.

25 MR. GIDEON: The gulf is a little wider in terms of



1 what we should doing. Judge Zobel just mentioned starting the  
2 first trial the second two weeks of July.

3 We have proposed to the PSC that we complete the  
4 case-specific discovery on the four cases the Court chose for  
5 trial, and not do the case-specific discovery on the other  
6 cases until we finish those.

7 It will be difficult to complete the case-specific  
8 discovery in three other cases while we're here trying the  
9 Wray case and then three others in sequence. So, there is a  
10 bit more of a gulf than Mr. Stranch has described.

11 JUDGE BOAL: All right. Thank you.

12 JUDGE ZOBEL: Ms. Johnson.

13 MS. JOHNSON: That brings us to the report from the  
14 pro se liaison. Ms. Martin will address that.

15 MS. MARTIN: Good afternoon, your Honor.

16 So, last time I told you about -- that I filed a  
17 motion on behalf of eight pro se claimants who had either  
18 filed proofs of claim after the deadline or who had not filed  
19 proofs of claim and that Judge Neiman had worked with me on  
20 that motion and asked me to do so for those claimants that he  
21 had denied their claims because of those untimely or -- well,  
22 untimely-filed proofs of claim.

23 This morning Judge Boroff granted the motion to allow  
24 those proofs of claim to be considered timely and also to  
25 allow those who have not yet filed them to file them within 30

1 days of the order. So, my office is already working on  
2 preparing those for those three pro se claimants who have not  
3 filed proofs of claim yet. So, we'll definitely get those  
4 filed for them well in advance of the 30-day limit and they  
5 should be all set at that point.

6 Mr. Ellis has already sent the list of those eight  
7 pro se claimants' names to the claims administrators for the  
8 various elements. So, they are aware that they have been  
9 considered timely and those claims can go forward.

10 JUDGE ZOBEL: Do you anticipate any more of those?

11 MS. MARTIN: I don't, but, of course, if they do come  
12 along, I will work with the judges to do the best we can for  
13 them.

14 MR. ELLIS: Your Honor, this is Mr. Ellis.

15 There is going to be one more. Judge Neiman denied  
16 another claim, but gave them 60 days to file a similar motion.  
17 That claimant is represented by counsel. So, I will work with  
18 counsel and make sure that gets done.

19 JUDGE ZOBEL: Thank you.

20 MS. JOHNSON: And now the schedule for future status  
21 conferences. We do have conferences set in May and June. The  
22 Court had indicated last time that it was likely to set a  
23 final pretrial conference for the first Bellwether trial to  
24 coincide with the June date, but I don't believe we actually  
25 calendared a date or a time for that. So, if appropriate, we

1 would ask that the Court consider that.

2 JUDGE ZOBEL: So, add pretrial conference for first  
3 trial?

4 MS. JOHNSON: Yes, your Honor.

5 JUDGE ZOBEL: To the June 23rd date.

6 JUDGE BOAL: I will just add, I've had a change in  
7 schedule. So, I am no longer available at 3 o'clock on that  
8 day. So --

9 JUDGE ZOBEL: You can do your thing in the morning if  
10 you can and I'll do this in the afternoon.

11 JUDGE BOAL: I'm actually not going to be here the  
12 whole day.

13 JUDGE ZOBEL: So, I can do the pretrial in the  
14 morning and this other thing in the afternoon.

15 JUDGE BOAL: So, as we head into that, if there are  
16 motions that need to be argued in June or you see that coming  
17 up, it will be helpful to know whether or not you need oral  
18 argument and if you do, I'll work with the parties to arrange  
19 a date in June to conduct the oral argument.

20 MS. JOHNSON: Thank you, your Honor.

21 JUDGE ZOBEL: Now, in July are we going to have a  
22 meeting, even though we also have a trial?

23 MS. JOHNSON: I think we could certainly coordinate  
24 the two, your Honor. I would think a status conference could  
25 be done following the trial one day, if -- well, if the

1 lawyers are all here and present if the Court wishes.

2 THE COURT: Well, do we need it?

3 MS. JOHNSON: The real question in my mind, your  
4 Honor -- and perhaps we should address this next month. It  
5 depends on what's going on with the Premier and with the Box  
6 Hill schedules.

7 JUDGE BOAL: Yes. So, I was just going to say maybe  
8 I should schedule something. I don't know if Judge Zobel  
9 needs to schedule something, but there may be discovery issues  
10 with Premier and Box Hill and I can always cancel it.

11 MS. JOHNSON: I think that's an excellent idea, your  
12 Honor.

13 JUDGE ZOBEL: So, I'll wait until next month for you  
14 to tell me what you want done.

15 MS. JOHNSON: Okay.

16 JUDGE BOAL: So, are there particular weeks in July  
17 that -- that's a tough time. I mean, should I schedule it for  
18 the afternoon during the trial, perhaps?

19 MS. JOHNSON: I think that would be ideal, your  
20 Honor, if that works for you.

21 JUDGE BOAL: All right. So, I'll wait until Judge  
22 Zobel sets the trial and then I'll pick an afternoon.

23 MS. JOHNSON: Excellent. Thank you.

24 JUDGE BOAL: Unless -- do the Premier or Box Hill  
25 people have any conflicts during the last two weeks in July?

1 Because you won't be here for the trial.

2 MR. KIRBY: This is Greg Kirby for Box Hill.

3 I probably will be out of town that last week of  
4 July, the last full week of July.

5 JUDGE ZOBEL: Out of this town or out of some other  
6 town?

7 MR. KIRBY: I'm sorry. Out of this town or my  
8 hometown.

9 JUDGE BOAL: All right. So, not the last week of  
10 July for you?

11 MR. KIRBY: Correct.

12 JUDGE ZOBEL: So, that means that we should start the  
13 trial on July 11th, not on the 18th?

14 JUDGE BOAL: He's not involved in that.

15 JUDGE ZOBEL: You're not involved in that. Okay.

16 MR. WOLK: I have no conflicts, Judge.

17 JUDGE BOAL: All right. So, I'll try and schedule it  
18 for the third week in July and that, hopefully, will overlap  
19 with the trial.

20 MR. KIRBY: Thank you, your Honor.

21 MS. JOHNSON: Thank you, your Honor.

22 That brings us to fully-briefed motions. The Ocean  
23 State's motion to dismiss the product liability claims,  
24 counsel for that has requested that oral argument be heard at  
25 the next status conference because they were not available

1 today. And then turning to --

2 JUDGE ZOBEL: I thought I had dealt with Dr. Barakat  
3 several times before.

4 MS. JOHNSON: You have --

5 JUDGE ZOBEL: Is he still around?

6 MS. JOHNSON: Yes, your Honor, I believe so, at least  
7 in this individual case. I have not looked at the papers  
8 closely to tell you what the issues are that overlap or that  
9 are different, but you certainly have dealt with him before.  
10 We will put that motion for argument on the May calendar, with  
11 the Court's approval, if you would like to hear it.

12 JUDGE ZOBEL: Okay. All right.

13 MS. JOHNSON: In terms of briefing in progress,  
14 you've heard reference to the motion to compel a second Dr.  
15 Kessler deposition. That briefing is not ripe yet, but will  
16 be for next time around, yes, and I would expect Judge Boal to  
17 hear that.

18 And, also, upcoming for the next time would be the  
19 Nashville defendants' motion to strike Matthew Lee as a case-  
20 specific expert, which we've also referred to earlier, but,  
21 again, that will be ready for next time.

22 JUDGE ZOBEL: Then we come to other motions.  
23 Plaintiff Jones' motion for substitution of party, is that  
24 something that we'll hear both?

25 MS. JOHNSON: One second, your Honor, if I may.

1 (Pause.)

2 MS. JOHNSON: This is just a motion to substitute a  
3 personal representative where the plaintiff is deceased. I  
4 don't expect it to be opposed, but I haven't spoken to the  
5 defendants about it either.

6 The time for an opposition has technically not yet  
7 run, your Honor. So, perhaps we will wait until next time to  
8 address it, but I don't expect it to be opposed.

9 JUDGE ZOBEL: And the last one, a dispositive motion  
10 on the claims for agency and direct liability.

11 MR. STRANCH: Yes, your Honor.

12 THE COURT: Do you want to respond to that?

13 MR. STRANCH: It's due tomorrow. We spoke with the  
14 defendants and they've agreed to allow us to extend that  
15 response until Wednesday and it will be ready for argument at  
16 the May conference.

17 THE COURT: So, you want to have argument on it?

18 MR. STRANCH: If the Court wishes, we would be happy  
19 to have argument on it.

20 JUDGE ZOBEL: What do counsel wish?

21 MS. GREER: We would like to have oral argument on  
22 it, your Honor. We'll be brief.

23 MR. STRANCH: We'll be briefer.

24 JUDGE BOAL: I believe at the last conference, I had  
25 asked about other groups of plaintiffs for which we might not

1 have a schedule.

2 MS. JOHNSON: Yes, your Honor, and we have been  
3 addressing that with various plaintiffs' counsel. We were not  
4 -- I had intended to say something. Thank for reminding me.

5 We were not able to reach a consensus on that before  
6 the status conference, but as part of the discussions that are  
7 ongoing, we hope to have something for you before the next  
8 status conference.

9 JUDGE BOAL: Thank you.

10 JUDGE ZOBEL: Is there anything else that we need to  
11 discuss today, now that we've completed the agenda?

12 (No response.)

13 JUDGE ZOBEL: Thank you all.

14 MS. JOHNSON: Thank you, your Honor.

15 MR. TARDIO: Thank you, your Honor.

16 MR. STRANCH: Thank you, your Honor.

17 JUDGE ZOBEL: Court is in recess.

18 (Adjourned, 2:47 p.m.)  
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## C E R T I F I C A T E

I, Catherine A. Handel, Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript, from Page 1 to Page 40, constitutes to the best of my skill and ability a true and accurate transcription of my stenotype notes taken in the matter of Multidistrict Litigation No. 13-02419-RWZ, In Re: New England Compounding Pharmacy Cases Litigation.

April 27, 2016  
Date

/s/Catherine A. Handel  
Catherine A. Handel, RPR-CM, CRR